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No. 93-1388

In The

Supreme Court of the United States

October Term, 1993

JANINE LAMBERT, EVA BAKER and TAMI FOSTER,
Petitioners,

vs.

THE GENESEE HOSPITAL, FRANCIS DUPRE, Individually and as Manager of the Duplicating Services Department of The Genesee Hospital, TOD TIMMEL, Individually and as Materials Manager,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the plaintiffs introduce sufficient evidence to prove that they each were denied promotion to Department manager because of their sex or unlawful retaliation, given that no plaintiff applied or met the stated qualifications for the position?

2. Did the Second Circuit correctly decline to review the district court judge's grant of a new trial in the alternative?

3. Did plaintiffs fail as a matter of law to prove that each of them was denied the manager job due to unlawful retaliation under the Equal Pay Act because: a) none of them filed an Equal Pay Act complaint before the manager was selected, and b) none of them met the job's stated qualifications nor applied, and the Second Circuit incorrectly barred defendants from seeking judgment notwithstanding the verdict (j.n.o.v.) on this latter basis?

4. Did the district court correctly grant partial summary judgment to the defendants on various fact-specific issues?

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Second Circuit are listed in the caption. Defendant The Genesee Hospital ("Hospital") is a non-profit general hospital located in Rochester, New York. It has no parent company and no non-wholly owned subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JANINE LAMBERT, EVA BAKER and TAMI FOSTER,

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v.

THE GENESEE HOSPITAL, FRANCIS DUPRE, Individually and as Manager of the Duplicating Services Department of The Genesee Hospital, TOD TIMMEL, Individually and as Materials Manager,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Defendants The Genesee Hospital, Francis Dupre, and Tod Timmel respectfully request that the Court deny plaintiffs' petition for writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

This case was tried before the Hon. David G. Larimer, Western District of New York. Judge Larimer's opinion is

unpublished. Plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which issued its original opinion September 17, 1993. Plaintiffs petitioned for rehearing en banc, and that petition was denied December 9, 1993. The Second Circuit issued an amended opinion as of November 24, 1993, published at 10 F.3d 46 (2d Cir. 1993).

PERTINENT STATUTES

Equal Pay Act, 29 U.S.C. § 215(a)(3):

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person --
>
> * * * *
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees. . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

COUNTER-STATEMENT OF THE CASE

This sex discrimination case arises out of employment decisions by The Genesee Hospital ("Hospital") shortly before and after the death in May 1984 of Terri Shiels. Ms. Shiels was the long-term, female Department manager of the Hospital's Duplicating Services Department ("Department").

When the three female plaintiffs joined the Department in 1980 and 1982, they had no prior printing or microfilming experience. When defendant Francis ("Bo") Dupre was hired as a printer in 1982, he had six years prior work experience as a printer. Shiels died in 1984. Her supervisor, defendant Tod Timmel, sought

candidates for her position by posting the vacancy within the Hospital (A. 6470) and by placing an advertisement in the newspaper (A.6471).[1]

The stated qualifications for the job were lifted word-for-word from the job description that Shiels had fulfilled as Department manager and which had been in place since the 1970's. (A. 6526, 6512). The qualifications included 5-6 years experience in the type of work done by the Department. Dupre had this experience; the plaintiffs did not. All three plaintiffs admit they were aware that the job vacancy was posted, yet none of them applied. (A. 3440, 4008, 4011,4321). Dupre applied, was interviewed, and in September 1984, was selected as Department manager.[2]

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[1] Footnotes designated (A.--) refer to the record on appeal. Those designated (--a) refer to the amended Second Circuit opinion attached as an Appendix to the Petition for Writ of Certiorari.

[2] Timmel chose Dupre as manager because he met the stated qualifications and because he considered Dupre to be the best candidate of those who had applied. (A. 4766). Contrary to the assertion in footnote 5 of plaintiffs' petition, the Hospital does not claim it selected Dupre because he was a "skilled printer." Defendants therefore do not address factual inaccuracies in plaintiffs' petition on this and other issues irrelevant to the

The three plaintiffs filed EEOC charges dated October 1984. They later commenced this action, alleging that their failure to be selected as manager constituted sex discrimination and unlawful retaliation by the Hospital.

In their lawsuit, the three plaintiffs also challenged every other employment decision in the Department from which they did not benefit. They claimed that Timmel's transfers and reassignments of Department personnel within the Department from 1982 to 1984 were discriminatory and constituted retaliation. These changes were made to cover both Shiels' medical leaves of absences as she became increasingly ill, and Foster's pregnancy leave and work restrictions. They included appointing Dupre as temporary "charge-person" over the Department's printing area while Shiels was ill. Plaintiffs also objected to the Hospital classifying the operator of the larger printing press one wage grade higher than the operator of the smaller press.

Plaintiffs also claimed that Dupre discriminated and retaliated against them when he became Department manager by, for

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holdings below.

example, not letting plaintiffs or their friends smoke in no-smoking areas, and telling Foster that two printing jobs were "rush" when they were not. Baker and Foster quit their jobs a few months after Dupre became manager. Each claimed Dupre constructively discharged her, even though Dupre had convinced Baker to rescind a previous resignation soon after he became manager.

The district court judge granted summary judgment on several issues very near to the trial date. The judge anomalously allowed plaintiffs' challenge to the manager appointment to go to trial in order to give plaintiffs an opportunity to produce evidence justifying their failures to apply and to meet the job qualifications.

The Equal Pay Act claims, including claims of alleged retaliation under the Equal Pay Act, were heard by a jury. The trial lasted over five weeks. Over strenuous objections by defendants, the judge allowed extensive testimony about the claims he had already dismissed as defective as a matter of law. (*E.g.*, A. 3393-3396, 3426-3431, 3576-3577, 3848-3849, 4076-4080).

The jury found in favor of defendants on all the retaliation claims against Dupre and on Foster's substantive Equal Pay Act

claim. Over defendants' objections to the jury instructions, the jury found that the defendants had retaliated against all three plaintiffs by not selecting all of them as manager. The jury also found that Baker had been denied equal pay for her microfilm clerk duties within the microfilm area. The jury apparently concluded that Baker should have received the same $12/week raise that Dupre received when he acted as charge-person of the printing area.

The judge took additional testimony on plaintiffs' Title VII claims and Human Rights Law claims and rendered judgment for the defendants on all issues except those on which he believed he was bound by the jury verdict.

In response to defendants' motion for judgment notwithstanding the verdict (j.n.o.v.) and a new trial in the alternative, the judge granted j.n.o.v. dismissing those claims for which the jury had ruled for plaintiffs. In particular, the district judge found that the plaintiffs did not apply for or meet the qualifications for the Department manager position, and therefore failed as a matter of law to prove sex discrimination or unlawful retaliation. He also found that Baker, as a matter of law, did not

perform duties substantially equal to those of Dupre when Dupre was charge-person: Baker was indisputedly a microfilm clerk and not a printer, and Dupre performed supervisory functions such as completing performance appraisals, while Baker did not. The judge granted a new trial in the alternative should j.n.o.v. be reversed.

On appeal, the Second Circuit upheld the district court's rulings with two exceptions. The Second Circuit remanded the New York Human Rights Law claims for trial by jury, instead of by bench. The Circuit also reversed the j.n.o.v. on Baker's Equal Pay Act claim, but affirmed the grant of a new trial. Finally, the Circuit held that, as a matter of law, plaintiffs had not produced evidence showing they were discriminated or retaliated against under any statute with regard to the manager job.

Plaintiffs petitioned for a rehearing. The Second Circuit issued an amended opinion without permitting defendants to respond to the petition, as is "ordinarily" required under Rule 40 of the Federal Rules of Appellate Procedure. The opinion contained the same holdings, but eliminated one legal basis for overturning the jury verdict regarding the manager job. The Second Circuit

concluded that defendants had not argued in their directed verdict motion that plaintiffs had not applied and were not qualified to be manager. Therefore, defendants were barred from challenging the jury verdict on this ground. The Second Circuit ignored the fact that during trial the district judge explicitly stated in open court that he was considering granting defendants' directed verdict motion on the grounds that plaintiffs had not applied for the manager job. (A.5929-5930). The Second Circuit continued to uphold the dismissal of plaintiffs' challenge to the manager decision because plaintiffs had not fulfilled the prerequisites for stating a retaliation claim under the Equal Pay Act. Plaintiffs had merely stated to Hospital personnel that it was "not fair" that Baker was not receiving charge-person pay; they had not filed a formal Equal Pay Act complaint before Dupre was selected as manager.

As of the date of this petition, the district court has scheduled a retrial to be held in September 1994 on plaintiffs' Human Rights Law claims and Baker's remaining Equal Pay Act claim.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Because the Second Circuit Has Remanded This Case For a New Trial, the Second Circuit's Ruling is Interlocutory and Therefore Not Appropriate For Review by This Court.

As discussed above in the Counter-Statement of the Case, the Second Circuit ordered that this case be remanded for a new trial on various issues under the New York Human Rights Law, N.Y. Exec. Law §§ 291 et seq., and the Equal Pay Act, 29 U.S.C. § § 206(d) et seq. Review by this Court is a matter of judicial discretion, which the Court will exercise "only when there are special and important reasons therefor." Sup. Ct. R. 10, 493 U.S. 1097, ---, 110 S. Ct. 21 (1989). It has been the general practice of this Court not to exercise its discretion to review an interlocutory order because the lower courts may render moot any issues raised. Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co., 389 U.S. 327, 328 (1967); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); Estelle v. Gamble, 429 U.S. 97, 114-115 & n.9 (1976) (Stevens J., dissenting); Virginia Military Inst. v. United

States, -- U.S. -- , 113 S. Ct. 2431-32 (1993) (Scalia, J., concurring).

Although this Court has made exceptions to the general rule, this case presents none of the articulated concerns on which the Court has based review of an interlocutory order. This case does not raise any question important to the administration of federal criminal laws. Carroll v. United States, 354 U.S. 394, 397 (1957). Nor does the case present an issue "fundamental to the further conduct of the case." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949); Land v. Dollar, 330 U.S. 731, 734 (1947); United States v. Gen. Motors Corp., 323 U.S. 373, 374-75 (1945). Plaintiffs raise no novel and important question "deeply affecting the administration of justice in the Circuit Court of Appeals," the answer to which might render the lower court's decision void. Am. Constr. Co. v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372, 387 (1893). And although plaintiffs claim a conflict among the circuits, the conflicts alleged do not go to the heart of "fundamental questions," Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 408-09 (1916), let alone overcome the other reasons, discussed *infra*, why the Court should not grant plaintiffs' petition.

II. Plaintiffs' Challenge to the Promotion of Defendant Dupre Presents no Question of Significance to This Court.

In their first point, plaintiffs present a question that concerns only the particular facts of this case, and thus not a question this Court should review. United States v. Johnston, 268 U.S. 220, 227 (1925); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949); NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 176 n.8 (1981). Plaintiffs challenge the Second Circuit's ruling that they furnished no facts concerning the selection of the Department manager that were sufficient to state a claim for sex discrimination or retaliation under either Title VII of the Civil Rights Act of 1964 or the New York Human Rights Law.[3] Plaintiffs also appear to challenge the Second

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[3] In assessing discrimination claims under the New York Human Rights Law, the New York state courts have applied the analysis set out by this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). *See e.g.*, Miller Brewing Co. v. State Div. of Human Rights, 66 N.Y.2d 937 (1985)(mem. decision).

Circuit's conclusion that there was no retaliation under the Equal Pay Act, even though the Second Circuit relied on a different basis for this holding (which is discussed further in Point IV, *infra*).

Regardless of how plaintiffs characterize their argument, both the district court and the Second Circuit held that, as a matter of law, no plaintiff could prove she was unlawfully denied the Department manager position because of her sex or because of unlawful retaliation. It was undisputed that none of the plaintiffs met the qualifications for the Department manager's job and that none of them even applied for the job. (86a). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (plaintiff must meet the stated qualifications and apply for the job to state a *prima facie* case of discrimination). Plaintiffs offered no evidence that the stated job qualifications, taken word-for-word from the job description of the previous female Department manager, could be pretexts for sex discrimination or unlawful retaliation against plaintiffs. (87a).

Moreover, none of the plaintiffs was excused from applying for the manager job as part of her *prima facie* burden. No plaintiff

presented evidence that her application would have been futile under the principles of International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)(citing example where practices are tantamount to a sign on door reading "Whites Only," in the case of racial discrimination). Plaintiffs' sole basis for claiming futility is that defendant Timmel said he planned to include outside candidates in his job search. Yet, all three plaintiffs admit they were aware that the Hospital also had posted the job vacancy internally. There was no evidence whatsoever that any Hospital representative (or anyone else) instructed the plaintiffs not to apply. Under these circumstances, plaintiffs cannot show futility as a matter of law. Teamsters, 431 U.S. at 365. Their collective failure to apply for the position is fatal to their claims. *Accord*, Box v. A & P Tea Co., 772 F.2d 1372, 1376-77 (7th Cir. 1985), cert. denied, 478 U.S. 1010 (1986); Giles v. Ireland, 742 F.2d 1366, 1376-77 (11th Cir. 1984).

III. The Second Circuit Correctly Declined to Review the District Court Judge's Grant of a New Trial in the Alternative on Baker's Equal Pay Claim.

After overturning the district court judge's grant of j.n.o.v. on whether Baker was entitled to charge-person pay under the Equal Pay Act, the Second Circuit held that it could not review the judge's grant of a new trial in the alternative because the judge had ruled that the verdict was against the weight of the evidence. The Second Circuit, without any further analysis, relied on its prior panel decision in Dunlap-McCuller v. Riese Org., 980 F.2d 153 (2d Cir. 1992), cert. denied, 114 S. Ct. 290 (1993), in support of its ruling. Plaintiffs claim that the Second Circuit's holding creates a conflict among the circuits, warranting review by this Court.

This issue is not appropriate for review for several reasons. First, plaintiffs' substantive claim has been remanded for retrial, and plaintiffs may yet prevail.

Second, there is an intracircuit dispute within the Second Circuit concerning whether orders granting or denying a new trial are immune from review or should be reviewed under an abuse of

discretion standard. In several recent cases, Second Circuit panels have adopted the majority rule that the Circuit will review orders for abuse of discretion. *See, e.g.*, Diamond D Enterprises USA, Inc. v. Steinsvaag, 979 F.2d 14 (2d Cir. 1992), cert. denied, 113 S. Ct. 2442 (1993); Song v. Ives Laboratories, Inc., 957 F.2d 1041 (2d Cir. 1992); Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992); Purnell v. Lord, 952 F.2d 679 (2d Cir. 1992). None of these panels has stated definitively that the Second Circuit has adopted one rule or the other for all future cases, nor has the entire Circuit considered the issue *en banc*.

Thus, it is not clear that the Second Circuit has solidified its position on this issue, creating a true conflict among the circuits. Because the Second Circuit has not resolved this issue, it would be more appropriate for this Court to permit the Circuit to determine its final position on its own, without premature -- and perhaps unnecessary -- intervention. *See, e.g.*, Davis v. United States, 417 U.S. 333, 340 (1974); Justice Harlan, *Manning the Dikes*, 13 Record of N.Y. City Bar Assoc. 541, 552 (1958) ("[D]ecisions between different panels of the same Court of Appeals will not be considered

to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself").

Third, even if the Second Circuit had reviewed the trial court's order using an "abuse of discretion" standard, the Circuit still would have sustained the order for all the reasons the judge granted j.n.o.v.[4] This is true even though the Circuit overturned the judge's ruling on j.n.o.v. In reviewing a j.n.o.v. ruling, the appellate courts review the facts *de novo*. *See*, Phelps v. Yale Security, Inc., 986 F.2d 1020, 1023 (6th Cir.), cert. denied, -- U.S. --, 114 S. Ct. 175 (1993). In reviewing an order for abuse of discretion, the Circuit does not assess the facts on its own, but merely considers whether the judge's ruling is "clearly unreasonable, arbitrary, or fanciful. . . ." Hendler v. United States, 952 F.2d 1364, 1380 (Fed. Cir. 1991). The trial judge overruled the jury verdict because he determined that on the facts of this case, no reasonable jury could have found for the

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[4] This applies equally to the district judge's grant of a new trial on plaintiffs' claims of retaliatory denial of promotion, as discussed more fully in Point II, *infra*.

plaintiffs. Verdegaal Bros., Inc. v. Union Oil Co. of California, 814 F.2d 628, 631 (Fed. Cir.), cert. denied, 484 U.S. 827 (1987). Baker worked as a microfilm clerk, while Dupre was a printer. Dupre, as printing area charge person, prepared performance evaluations and disciplined other employees, while Baker did not. (A. 3974-3976, 4025, 6915-6920). Thus Baker could not prove that her duties in the microfilm area and Dupre's duties as charge-person of the printing area were "substantially equal" under the Equal Pay Act. Because there is substantial evidence in the record to support the trial judge's decision, the Second Circuit would have upheld the judge's order even if it had used the highly deferential "abuse of discretion" standard.

Indeed, not only should the district court's grant of a new trial be upheld, but the j.n.o.v. granted by the district court should be reinstated because, as a matter of law, Baker could not show that she performed the same job duties as Dupre.

IV. The Second Circuit's Statement That the Equal Pay Act Requires an Employee to File a Formal Complaint in Order to Come Within the Act's Protection from Retaliation Does Not Warrant Review by This Court.

A. The Second Circuit's fact-specific ruling does not necessarily conflict with the rulings of other circuits

The decision below does not indicate any real conflict among the circuits. The Second Circuit held that plaintiffs failed to show they had "filed a complaint" within the meaning of the Equal Pay Act where they merely complained within the Hospital that it was "not fair" that Baker was not receiving charge-person pay, without ever stating they believed sex was the reason for the disparity. (76a).[5] The Second Circuit concluded that the Equal Pay Act requires an employee to file a formal complaint before he or she can state a claim for alleged retaliation based on that complaint. (73a-

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[5] Plaintiffs assert in their petition that they also complained of "sex discrimination" to the Hospital president. They refer, however, to a complaint they allegedly made after Dupre was selected manager. (A. 3452-3455). This complaint has no bearing on whether plaintiffs stated a claim for retaliation for denial of the manager position, which was the issue before the Second Circuit.

74a). Although this statement does not agree with those of other circuits cited in the Second Circuit opinion, the Circuit's actual holding does not create a conflict with those opinions, given the circumstances of this case.

In none of these opinions did a court permit an informal complaint to a supervisor to serve as a predicate for an Equal Pay Act retaliation claim where the complaint is merely one of "unfair" wages. The other circuits have required more explicit action by an employee to evoke the protection of the Act. For example, in Love v. RE/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984), the plaintiff attached a copy of the Equal Pay Act to her complaint to the company president about her wages. In EEOC v. Romeo Community Schools, 976 F.2d 985, 989 (6th Cir. 1992), the parties did not dispute that the plaintiff had complained of unlawful sex discrimination and told her employer she believed it was "breaking some sort of law." In EEOC v. White & Son, 881 F.2d 1006 (11th Cir. 1989), the female plaintiffs asked why male employees, and not they, had received a raise, and then requested equal pay. In Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987), the employer mistakenly

believed that the employee had filed a formal complaint. And in Brennan v. Maxey's Yamaha, 513 F.2d 179 (8th Cir. 1975), the plaintiff protested her employer's actions as illegal and wrong after the Department of Labor had investigated the employer and the employer had agreed to pay back wages.

The instant opinion of the Second Circuit is not contrary to these decisions. Indeed, the Court below specifically reaffirmed its prior decision in Brock v. Casey Truck Sales, Inc., 839 F.2d 872 (2d Cir. 1988), where the court found retaliation after a plaintiff complained to her supervisor about actions relating to a prior Department of Labor investigation. The Second Circuit has not indicated whether it will expand its holding below to include informal complaints that clearly state their basis in the Equal Pay Act. Until and unless the Second Circuit holds that under no circumstances can an informal complaint form the basis for a retaliation claim, the positions of the Circuits are not in true conflict.

B. The plaintiffs as a matter of law were unable to prove retaliation in any event

On the facts of this case, plaintiffs cannot prove retaliation under the Equal Pay Act. Even if certain informal complaints were sufficient to evoke the protection of the statute, this is not the appropriate case for the Court to review.

In order to prove retaliation, plaintiffs must prove that (1) they engaged in a protected activity; (2) the employer was aware of this activity; (3) the employer took an employment action disadvantaging the plaintiffs; and (4) there is a causal connection between the protected activity and the disadvantageous employment action. Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980); De Cintio v. Westchester County Medical Center, 821 F.2d 111, 115 (2d Cir.), cert. denied, 484 U.S. 965 (1987). Even assuming that plaintiffs met the first element of this test by complaining informally to their supervisor, plaintiffs' claims are not saved because they failed to fulfill two of the other requirements of the test.

When plaintiffs complained about the fact that Baker was not receiving charge-person pay, they did not do so in a way that made the employer "aware of" the alleged protected activity. As noted above, at no time before Dupre was selected as manager did any of the plaintiffs claim that Baker or the others were being paid less than a male member of the Department because of their sex. The only complaint plaintiffs made was that it was "not fair" that Baker was not receiving charge-person pay, without asserting that sex discrimination was involved. (76a). Such vague comments were insufficient to put the Hospital on notice that plaintiffs were attempting to assert rights under the Equal Pay Act.

Nor did plaintiffs show any nexus between Dupre's promotion and their complaints. As discussed in Point II and in the Counter-Statement of the Case, *supra*, Dupre met the stated qualifications for the job, while plaintiffs did not, and Dupre applied for the job, while plaintiffs did not. As a matter of law, plaintiffs could not show they were denied the manager position due to unlawful retaliation.

The Second Circuit erroneously refused to reach this issue on the ground that defendants had not challenged the promotion decision in their directed verdict motion, thereby barring defendants from challenging it upon a motion for j.n.o.v. *See* Fed. R. Civ. P. 50. This ruling stands on its head the meaning of Rule 50; *i.e.*, to prevent the movant from using a j.n.o.v. motion as a "trap" for springing new defenses upon an opponent. *See* Ebker v. Tan Jay Int'l Ltd., 739 F.2d 812, 824 (2d Cir. 1984). The district judge discussed this directed verdict issue with both counsel in open court during trial:

> We have revisited this a couple of times here, but you know, interesting facts, you have got two [sic] people here claiming they should have been manager who didn't even apply, which gives me great pause, really, as to whether a directed verdict should be granted on that basis alone.
>
> ... That's right, that's right [that all three plaintiffs did not apply]. (A.5929-30).

The judge also addressed this issue at great length in his decision denying summary judgment shortly before trial began.

C. The decision below was correct based on the plain language of the Equal Pay Act

The Second Circuit's construction of the Equal Pay Act was correct because it follows the plain language of the statute. This Court has held that in construing a statute, the "'starting point must be the language employed by Congress.'" Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (citation omitted); Mallard v. United States Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language"). In reviewing the language of a statute, the Court assumes "'that the legislative purpose is expressed by the ordinary meaning of the words used.'" Am. Tobacco, 456 U.S. at 68 (citation omitted). If "the intent of Congress is clear, that is the end of the matter; for the court. . . must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

The intent of Congress in enacting the section of the Equal Pay Act codified at 29 U.S.C. § 215(a)(3) is clear and unambiguous.

Congress declared that an employer may not discharge an employee or take other adverse action against the employee if the employee

> has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee

(emphasis added). By its terms, therefore, Section 215(a)(3) "protects from retaliation only those employees who engage in three expressly enumerated types of conduct." Romeo Community Schools, 976 F.2d at 990 (emphasis added)(Surheinrich, J., dissenting in part).

The anti-retaliation provision of the Equal Pay Act contrasts with its much broader counterpart in Title VII. In addition to protecting employees who make a charge, testify, assist, or participate in an investigation or proceeding, Title VII also protects from retaliatory action any employee who "oppose[s] any practice made an unlawful employment practice by this subchapter. . . ." The plaintiffs here do not allege, let alone present evidence, that they met the requirements of the Equal Pay Act by filing a complaint,

instituting a proceeding, testifying in a proceeding, or serving on an industry committee before Dupre was selected as manager. Thus, their actions do not come within the plain language of the statute.

The construction plaintiffs propose is directly contrary to the express terms of the statute.[6] This Court has held that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." Am. Tobacco, 456 U.S. at 75 (citation omitted). As the language of the Equal Pay Act is clear on

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[6] Plaintiffs claim that the Second Circuit's holding is contrary to EEOC guidelines. Such guidelines, however, "do not have the force of law. . . ." Int'l Assoc. of Firefighters v. Cleveland, 478 U.S. 501, 518 (1986). Agency guidelines are "'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" Cleveland, 478 U.S. at 518 (emphasis added) (quoting Gen. Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976)). Courts are not bound by the EEOC's interpretation, however. "[W]hen an agency attempts to give meaning to a statute that is plain on its face, we need not defer to the agency. . . ." Fertilizer Inst. v. United States EPA, 935 F.2d 1303, 1309 (D.C. Cir. 1991); New York City Health & Hospital Corp. v. Perales, 954 F.2d 854 (2d Cir. 1992), cert. denied, -- U.S. --, 113 S. Ct. 461 (1992). On the contrary, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron, 467 U.S. at 843 n.9.

its face, there is no need to go beyond the statute in an attempt to create a contrary meaning.

D. The ruling below presents no question of general importance

Furthermore, contrary to plaintiffs' assertion, allowing the Second Circuit's ruling to stand will not eviscerate the protection afforded to employees under the law. As discussed above, employees claiming sex discrimination are afforded broad protection from unlawful retaliation under Title VII. Plaintiffs in this case, in fact, brought their retaliation claims under both statutes. The 1991 amendments to Title VII allowing jury trials for Title VII actions further remove any differences between actions under the two statutes.[7] Thus, future plaintiffs who claim discrimination will not

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[7] This Court has denied certiorari, despite a conflict between the circuits, if a statute has expired or been amended in a manner that will prevent the problem from arising in the future. *See, e.g.*, United States v. Abrams, 344 U.S. 855 (1952); Community Services, Inc. v. United States, 342 U.S. 932 (1952); Sokol Bros. Furniture Co. v. Commissioner, 340 U.S. 952 (1951); United States v. Beal, 340 U.S. 852 (1950) (cited in Robert L. Stern, et al. *Supreme Court Practice* (7th ed. 1993)). The Court also has denied certiorari where the outcome of the case will not change regardless of which statute is applied. *See, e.g.*, Sommerville v. United States, 376 U.S. 909 (1964).

be left without legal recourse if this Court declines to review the ruling below. This Court, therefore, should decline to grant certiorari. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955)(citing Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923)).

V. The Remainder of Plaintiffs' Claims Concern Factual Issues That Were Properly Decided by the District Court and thoroughly Reviewed by the Second Circuit.

Plaintiffs object to the district court judge's grant of summary judgment on three specific issues. Each of the alleged errors concerns purely factual matters, and plaintiffs do not cite any important questions for this Court to review.

First, the district judge correctly dismissed Lambert's and Foster's claims that they were denied equal pay for work on the 360 press as compared to the 385 press. As discussed by the Second Circuit, there was insufficient evidence to present this claim to the

jury. (89a-90a). The Circuit correctly concluded that "plaintiffs proposed no facts that would show that the [360 and 385] positions were substantially equal." (90a).

Second, the district court did not err in dismissing Foster's claim that the Hospital discriminated against her by failing to reassign her to a printing press job immediately upon her return from maternity leave. The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), does not require employers to hold a job open for an employee disabled by pregnancy if the employer does not do so for employees disabled by other conditions. 29 C.F.R. § 1604. Plaintiffs offered no evidence that the Hospital implemented its leave of absence policy in a way that discriminated against women or against Foster. Foster lost no pay or benefits during the few months she worked as a microfilm clerk instead of as a printer.

Finally, plaintiffs offered no evidence that the Hospital discriminated against them on the basis of sex when deciding which Department employees to transfer to various Department positions. The Second Circuit correctly found that "the plaintiffs failed to produce any evidence to support an inference of discriminatory

motive in the assignment of employees to the various printer positions." (91a).

Plaintiffs' reference to St. Mary's Honor Center v. Hicks, -- U.S. --, 113 S. Ct. 2742 (1993) does not transform these three fact-based rulings into a federal question. Plaintiffs seem to be arguing that Hicks holds that a court cannot grant summary judgment in a discrimination case after the plaintiff states a *prima facie* case and the defendant has articulated a legitimate, non-discriminatory reason for its action because the jury is the "appropriate fact finder" (*i.e.*, at the "credibility assessment" stage of the trial). (Pl. Petition at 36-37).

Hicks contains no such holding. The Hicks case did not concern summary judgment, and nowhere in the opinion did this Court hold that summary judgment cannot be granted in a discrimination case. Instead, Hicks specifically held that any presumption of discrimination created by the *prima facie* case is eliminated once the defendant articulates a legitimate, non-discriminatory reason for its actions. Hicks, 113 S. Ct. at 2749. In order to rule in favor of a plaintiff, the trier of fact must

affirmatively find that the true reason for the disputed employment action was discrimination. Hicks at 2749, 2751, 2754. Plaintiffs could not meet this burden as a matter of law on the above facts. Their claims were properly dismissed at summary judgment.

CONCLUSION

For all of the reasons discussed above, this Court should exercise its discretion to deny plaintiffs' petition for a writ of certiorari.

Respectfully submitted,

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